Supreme Court, U.S.
FILED
JAN 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY C. ROSE, WARDEN, *Petitioner,*

v.

STANLEY BARHAM CLARK, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION THE UNIVERSITY OF VIRGINIA POST-CONVICTION ASSISTANCE PROJECT

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

25 pp

QUESTION PRESENTED

Whether the state trial court's error in instructing the jury on an impermissible presumption with respect to criminal intent was harmless error in a case in which the error, combined with other instructions, plainly required that the jury presume Mens Rea despite defense evidence casting doubt upon the defendant's state of mind.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
WHETHER THE STATE TRIAL COURT'S ERROR IN INSTRUCTING THE JURY ON AN IMPERMISSIBLE PRESUMPTION WITH RESPECT TO CRIMINAL INTENT WAS HARMLESS ERROR IN A CASE IN WHICH THE ERROR, COMBINED WITH OTHER INSTRUCTIONS, PLAINLY REQUIRED THAT THE JURY PRESUME MENS REA DESPITE DEFENSE EVIDENCE CASTING DOUBT UPON THE DEFENDANT'S STATE OF MIND	i
TABLE OF CONTENTS	ii
TABLE OF CASES	iii
STATEMENT OF INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. In Most Cases in Which a Trial Court Gives Instructions That Violate *Sandstrom* over the Specific Objection of a Defendant Who Clearly States that Mens Rea is an Important Issue to the Defense, There Is a Reasonable Possibility that the Erroneous Instructions Are Prejudicial and There is No Reason Why the Trial Court's Purposeful Error Should be Protected under the Harmless Error Rule	5
II. This Court's Decisions Plainly Recognize That A State May Effectively Preclude A Defendant From Raising A *Sandstrom* Claim Not Specifically Identified And Brought To The Attention Of The State Trial Judge	11
III. The Jury Instructions Given By The Trial Court And The Concession By The Petitioner Clearly Establish A *Sandstrom* Violation And Demonstrate That Petitioner Was Denied His Right To Have The Jury Consider His Mens Rea Defense	12
CONCLUSION	20

TABLE OF CASES AND AUTHORITIES

Page

Chapman v. *California*, 386 U.S. 18 (1967)..... 5, 6, 7, 10
Clarke v. *Rose*, 611 F. Supp. 294 (M.D. Tenn. 1983) *aff'd*, 767 F.2d 1006 (6th Cir. 1985) 4
Connecticut v. *Johnson*, 460 U.S. 73 (1983)..... 2, 7, 10
Engle v. *Isaac*, 456 U.S. 107 (1982)..... 3, 11
Frances v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985)..... 8, 11
Gideon v. *Wainwright*, 372 U.S. 335 (1963)..... 6
Kotteakos v. *United States*, 328 U.S. 750 (1946)..... 5
Mellons v. *State*, 560 S.W.2d 634 (Tenn. Crim. Apps. 1977)..... 11, 12
Pope v. *State*, 528 S.W.2d 54 (Tenn. Crim. Apps. 1975) . 11
Reed v. *Ross*, ___ U.S. ___, 104 S. Ct. 2901 (1984) ... 3
Sandstrom v. *Montana*, 442 U.S. 510 (1979)..... *passim*
State v. *Martin*, ___ S.W.2d ___ (Tenn. Sup. Ct. decided December 30, 1985)..... 9, 18
Tumey v. *Ohio*, 273 U.S. 510 (1927) 6
Ulster County Court v. *Allen*, 442 U.S. 140 (1979)..... 9
United States v. *Agurs*, 427 U.S. 97, 106 (1976)..... 9
United States v. *Bagley*, ___ U.S. ___, 105 S. Ct. 3375 (1985) 10
United States v. *Frady*, 456 U.S. 170 (1982)..... 12
Wainwright v. *Sykes*, 433 U.S. 72 (1977)..... 3, 11

STATUTES AND RULES

Fed. R. Civ. P. 61..... 5
Fed. R. Evid. 103 (a)..... 5
28 U.S.C. § 2111..... 5

OTHER AUTHORITIES

Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988 (1973)..... 5, 6

STATEMENT OF INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia non-profit corporation founded in 1958. More than 2,000 lawyers, citizens of every State, belong. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The National Legal Aid and Defender Association (hereinafter NLADA) is a private, non-profit national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The Post-Conviction Assistance Project (hereinafter P-CAP) is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. P-CAP receives its funding from University of Virginia student activity funds, the University of Virginia Law School Foundation, and private donations. P-CAP members answer inquiries and requests for legal assistance from *pro se* litigants and, under the supervision of counsel, represent indigent litigants in both civil

and criminal matters in Virginia. Faculty members of the School of Law and Virginia attorneys in private practice provide the required supervision.

None of the amici have a financial interest in this case. Their interest is in the important legal issue on which the Court has granted review. Both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court has not held that in every instance in which a trial court gives jury instructions that violate *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), reversal of a defendant's convictions are required. And the United States Court of Appeals did not so hold in this case. The appendix to the amicus curiae brief filed by the United States reveals that the tremendous weight of authority is that *under some circumstances Sandstrom* errors may be so inconsequential as to be declared harmless. Amici believe that these decisions are sound and that they are in accord with the reasoning underlying all of the opinions of the Justices in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983).

For reasons to be spelled out at greater length in the full argument, amici believe that ordinarily when a defendant specifically objects to instructions that violate *Sandstrom* and calls the trial judge's attention to the constitutional problems with those instructions, and the defendant clearly makes an issue of the mens rea aspect of a case, a deliberate choice by the trial judge to give unconstitutional instructions rarely can be harmless error. In this situation, there is absolutely no justification for the continuing insistence by trial judges on delivering jury instructions that have been condemned on constitutional grounds, and the defendant's objection is a demonstration that mens rea is an important aspect of the case from the viewpoint of the defense.

Amici also believe that this Court has plainly indicated to state courts that they may bar a defendant from challenging instructions on appeal, by way of certiorari, or on habeas corpus, as violative of *Sandstrom* if the defendant fails to make a contemporaneous and proper objection to the instructions.[1] *Engle* v. *Issac*, 456 U.S. 107 (1982). Thus, the Tennessee state courts could have used, and in future cases may decide to use, a contemporaneous objection rule which would make it virtually impossible for defendants like Respondent, who failed to make a proper objection in the trial court, to challenge jury instructions on *Sandstrom* grounds.

The Tennessee courts utilize a contemporaneous objection rule in most cases.[2] Yet, the Tennessee Court of Criminal Appeals specifically reached the merits of Respondent's constitutional attack on the jury instructions and concluded that those instructions were valid.[3] Thus, the state court, as a matter of state law and state policy, chose not to rely on a procedural default and instead to determine the constitutional propriety of the instructions which Respondent challenged for the first time on appeal. Thus, this is not a case in which a State court is being compelled by federal law to reach the merits

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[1] Habeas corpus review may be permitted if the defendant establishes cause and prejudice under this Court's holding in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), for failing to make a proper objection. Cause and prejudice are not readily found, however. *See, e.g., Engle* v. *Issac*, 456 U.S. 107 (1982). The rare case in which the Court has excused a defendant who did not object is *Reed* v. *Ross*, ____ U.S. ____, 104 S. Ct. 2901 (1984). *Reed* is unlikely to be repeated in light of the age of the conviction and the holding of *Engle*.

[2] The Tennessee Court of Criminal Appeals recognized this in its opinion, at page 37 of Appendix C to the Petition for Certiorari.

[3] The opinion of the state intermediate appellate court is reproduced as Appendix C to the Petition for Certiorari.

of an issue. The State court chose to reach the merits when it did not have to.

These instructions were found by a United States District Court[4] and by the United States Court of Appeals for the Sixth Circuit[5] to violate *Sandstrom*. This Court denied certiorari with respect to the constitutional validity of the instructions, and amici assume therefore that the instructions were impermissible.

The United States Court of Appeals held that the error was not harmless, although it recognized that *Sandstrom* errors may under some circumstances be harmless. Amici believe that the jury instructions delivered by the trial court, and concessions in the Petition for Certiorari and the Brief for Petitioner, plainly establish that the presumption instructions given by the Trial Judge deprived the defendant, as a matter of law, of his right to have the jury consider his defense, which was plainly available under state law. Thus, amici argue that this Court need not hold that *Sandstrom* instructions are always prejudicial in order to affirm the Court of Appeals. Indeed, amici believe that the decision of the Court of Appeals is indisputably correct if the totality of the trial court's jury instructions are examined.

Thus, amici ask this Court to affirm the decision of the United States Court of Appeals and to hold that in this case there was prejudicial error under the normal standard for review of constitutional errors. Amici believe that no automatic reversal rule is required, but that trial judges should clearly understand that a defendant's

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[4] Its opinion, 611 F. Supp. 294 (M.D. Tenn. 1983), is reproduced as Appendix B to the Petition for Certiorari.

[5] Its unpublished opinion is reproduced as Appendix A to the Petition for Certiorari. The affirmance is listed at 767 F.2d 1006 (6th Cir. 1985).

timely and specific *Sandstrom* objections may not be ignored, and that it will be a rare case in which a conviction will be affirmed when *Sandstrom* error takes place notwithstanding a diligent effort by the defendant to avoid the unconstitutional instructions.

ARGUMENT

I. In Most Cases In Which A Trial Court Gives Instructions That Violate *Sandstrom* Over The Specific Objection Of A Defendant Who Clearly States That Mens Rea Is An Important Issue To The Defense, There Is A Reasonable Possibility That The Erroneous Instructions Are Prejudicial And There Is No Reason Why The Trial Court's Purposeful Error Should Be Protected Under The Harmless Error Rule

At one time in the United States, any error in the processing of a case, particularly a criminal case, was likely to require automatic reversal. *See generally*, Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 1000-1005 (1973). The automatic reversal rule undoubtedly provided windfalls to losing litigants and imposed retrial burdens on trial courts that could not be justified in some cases by the actual harm associated with an error. *Id.* at 1004-1005. Movement toward harmless error rules—e.g., 28 U.S.C. § 2111; Fed. R. Civ. P. 61; Fed. R. Evid. 103(a)—represented a judgment that some errors have too little impact on the outcome of a trial to warrant acceptance of the social costs associated with retrials.[6]

This Court has recognized the harmless error rule in numerous criminal cases, both with respect to constitutional and nonconstitutional errors. *See, e.g., Kotteakos* v. *United States*, 328 U.S. 750 (1946); *Chapman* v. *California*, 386 U.S. 18 (1967). The Court has stated that the test

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[6] This Court established this in *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

of whether state court errors of constitutional magnitude are prejudicial or harmless is a federal test. *Chapman* v. *California*, *supra*. A constitutional error generally is harmless in a criminal case only if it can be said with fair assurance that there is no reasonable possibility that the error contributed to the finding of a defendant's guilt. *Chapman*, 386 U.S. at 24.

In *Chapman*, the Court recognized that certain errors may be so devastating that they will never be regarded as harmful. Both the Petitioner and the United States as amicus curiae recognize this aspect of *Chapman*. The Petitioner asks this Court simply to hold that *Sandstrom* errors are not among those that require automatic reversal. The United States elaborates at greater length reasons for distinguishing *Sandstrom* from the constitutional violations that it concedes require automatic reversal.

Amici agree with the United States that the history of automatic reversal in this country and in England suggests that it is a device to be used with extreme caution.[7] *See* Saltzburg, *supra*, at 1026-27. Amici would go even further than the United States in this regard and recognize that even the violations identified by the United States as requiring automatic reversal could, depending on the circumstances of a particular case, be harmless error.

For example, the United States cites *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as among the examples of constitutional cases

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[7] Amici make this argument based upon the assumption that constitutional violations that do create a reasonable likelihood of prejudice will result in reversals and that appellate courts will apply the harmless error test accurately and with a careful eye on possible prejudice to defendants.

involving rights which, if violated, always would require reversal.[8] Amici would examine these rights somewhat differently. If, for example, a state trial judge who presided over a preliminary hearing had some financial interest in a case, but after accurately finding probable cause another judge presided over the trial, amici believe that a *Tumey* violation might be considered harmless. This is especially likely if there is no claim that the preliminary hearing affected the trial. Similarly, amici would suppose that if a defendant were denied counsel at a preliminary hearing or if counsel were ineffective at that hearing, the resulting error might also be harmless.

Amici suggest to the Court that it is proper to state, as it appears that the plurality and dissenting opinions in *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), recognized with respect to *Sandstrom* errors, that there are some kinds of mistakes that almost always will require reversal because they are so likely to be prejudicial. Amici would include the right to counsel and the right to a fair judge among these rights, as the Court included them in *Chapman*.

The United States argues that *Sandstrom* errors have none of the attributes that support an automatic reversal rule. But, amici do not argue any rule of automatic reversal to the Court. Rather, they suggest to the Court that *Sandstrom* errors closely resemble the kinds of errors that should almost always require reversal when a defendant calls the error to the attention of the trial judge, makes the correct constitutional argument, and the trial judge refuses to correct the error. Although the United States apparently concedes that if a trial judge directed the jury to return a guilty verdict, reversal would be required, because the trial judge would have invaded the

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[8] Of course, these are among the cases cited in *Chapman*.

defendant's right to trial by jury,[9] it argues, however, that a *Sandstrom* error is a partial deprivation of the right to a jury trial and warrants different treatment.

Amici respectfully submit that the United States has missed a crucial aspect of cases in which reversal is the usual result of an error. That aspect is the ease with which the error might be avoided. There is no reason why counsel should be denied to a defendant in the face of precedents giving defendants the right to assistance of counsel. The error generally is inexcusable both because it is likely to be harmful and because it is difficult to justify. Similarly, there is no reason why a judge should be assigned to a case in which he or she stands to profit from one outcome or another. The chance of harm is high and there is no legitimate reason for such an assignment.

Amici believe that *Sandstrom* errors should be analyzed in the same way, with one caveat: the correct approach in most cases (although it does not apply to the facts of the instant case) is for a reviewing court to focus on the conduct of the defendant at trial and to examine whether the defendant brought any *Sandstrom* problems to the trial judge's attention and explained why these problems might deprive the defendant of a fair trial by jury. Once the defendant does so, amici believe that state courts have no legitimate excuse for continuing to instruct juries in the language of presumptions that has been condemned by this Court since 1979. The argument by the State of California as amicus curiae begins with a candid admission that this Court's decisions in *Sandstrom*, *supra*, and *Francis* v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), should cause no "fear" among the

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[9] This situation would, of course, almost always require reversal. But it is possible to envision a jury convicting on a count unaffected by the judge's instruction. Amici do not believe that a finding of harmlessness would necessarily be inappropriate.

States. The State goes on to suggest that trial judges would be better advised to abandon reliance on presumption instructions.[10]

Amici respectfully suggest that a defendant who specifically objects to erroneous *Sandstrom* instructions and who indicates to the trial judge that such instructions may deny fair jury consideration of one or more elements of an offense demonstrates the importance of the mens rea issue in the defense theory of a case. Since there is absolutely no reason why a trial judge should persist in giving the unconstitutional instructions, there is every reason to assume that the *Sandstrom* error is prejudicial in this circumstance.[11]

The argument that amici make to the Court is that there are some errors that ought not be tolerated when the circumstances indicate that the government official who errs is on notice of the problem and has no legitimate reason for the error. Surely this must account in part for the Court's statement in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), that "[w]hen the prosecutor receives a

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[10] This advice certainly makes sense in view of this Court's decision in *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979), which clearly indicates how trial judges may instruct juries concerning permissible inferences without running into constitutional problems. In fact, the Tennessee Supreme Court held in a recent decision, *State* v. *Martin*, ____ S.W.2d ____, decided December 30, 1985, and not yet reported, that the word "presumption" should not be used to define malice in murder cases.

[11] Consistent with the argument they have made regarding other errors, amici can foresee situations in which a defendant will object to *Sandstrom* instructions but such instructions could not possibly hurt the defense. If, for example, in a murder case the defendant has raised a defense of alibi and stipulated that whoever committed the offense did so with malice, *Sandstrom* instructions would be objectionable on the ground that they are irrelevant but not because they have any tendency to be prejudicial.

specific and relevant request [for production of evidence that might be exculpatory], the failure to make any response is seldom, if ever, excusable."[12]

If the defendant calls *Sandstrom* problems to the trial judge's attention and specifically indicates why the problems threaten a fair trial for the defense, there is an opportunity for the judge to take corrective action that is not present in many other situations—e.g., when the government, unbeknownst to the Court, fails to disclose exculpatory evidence. Moreover, the *Sandstrom* problems are so easily corrected that it is difficult to understand why the State of Tennessee, the United States, and the State of California would argue against a rule such as that proposed by amici.[13]

The rule which amici suggest would meet the concerns expressed in Justice Blackmun's plurality opinion in *Connecticut* v. *Johnson*, 460 U.S. 73, 85-86, that a jury may fail to consider evidence of intent because of a presumption instruction, as well as the concerns expressed in Justice Powell's dissenting opinion in *Johnson*, 460 U.S. at 94-99, that reversal should not be required when a reasonable jury would not have been affected by presumption language in instructions. Amici respectfully suggest that were lower courts to focus on the specificity and timeliness of *Sandstrom* objections, cases like *Johnson* and

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[12] This is exactly the approach that amici recommend: assuming that the failure to respond by a trial judge is seldom, if ever, excusable. Amici have suggested—*see* note 11 *supra*— that there may be harmless errors. They believe that their approach is consistent with this Court's post-*Agurs* decision in *United States* v. *Bagley*, ____ U.S. ____, 105 S. Ct. 3375 (1985).

[13] It is unclear exactly what standard the Petitioner and its amici would have the Court adopt. California, for example, appears to accept *Chapman* while simultaneously arguing for proof of actual prejudice.

Francis v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), could be more easily decided. Where the defendant failed to specifically point to a *Sandstrom* problem, lower courts might well find in most cases that none existed, or that any problem really was unimportant to the defense.[14]

II. This Court's Decisions Plainly Recognize That A State May Effectively Preclude A Defendant From Raising A *Sandstrom* Claim Not Specifically Identified And Brought To The Attention Of The State Trial Judge

Under this Court's decisions in *Wainright* v. *Sykes*, 433 U.S. 72 (1977), and *Engle* v. *Issac*, 456 U.S. 107 (1982), Tennessee and every other State may bar a defendant from raising on appeal or on collateral attack a *Sandstrom* claim not properly raised at trial. A State that is concerned about unnecessary retrials might be well advised to do so, especially if it takes the view that defendants who are truly concerned about the potential prejudice of jury instructions will object to them.

The Tennessee Court of Criminal Appeals cited two cases—*Pope* v. *State*, 528 S.W.2d 54 (Tenn. Crim.Apps. 1975); *Mellons* v. *State*, 560 S.W.2d 634 (Tenn. Crim.

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[14] Amici recognize that Respondent failed to object to the impermissible instructions and that the approach they recommend certainly does not assist him. They believe, for reasons stated in Argument III, *infra*, that the instructions given at Respondent's trial actually deprived him of his right to defend against the mens rea element of first and second degree murder. Thus, under the *Chapman* standard, the instructions cannot be harmless. As noted in Argument II, *infra*, the prejudicial effect of the instructions would not by itself have been sufficient to compel a State appellate court to consider Respondent's claim or to permit him to bring a federal habeas corpus attack on the instructions. But, the State Court of Criminal Appeals made a conscious choice to evaluate the merits of the claim, and amici submit that on the merits Respondent was severely hurt by the erroneous instructions.

Apps. 1977)—that rely upon a contemporaneous objection bar to appellate review of instructions not challenged in the trial court. (Appendix C to Petition for Certiorari, at 37.) Yet, the Court chose to address the merits of Respondent's *Sandstrom* claim. Apparently, it believed that if a *Sandstrom* violation had been committed, Respondent should be permitted to correct the error.[15]

In light of the action taken by the State Court of Appeals, the argument that reversal because of a *Sandstrom* violation would unduly burden the state judicial system should be rejected. Presumably, the State Court of Appeals decided that it was important that Respondent not have suffered from a *Sandstrom* violation, important enough to jettison for purposes of this case the contemporary objection ban and to reach the merits. If this Court concludes, as amici believe that it should, that a *Sandstrom* violation occurred, affirmance of the decision below by the United States Court of Appeals is consistent with the approach taken by the State Court of Appeals.

III. The Jury Instructions Given By The Trial Court And The Concession By The Petitioner Clearly Establish A *Sandstrom* Violation And Demonstrate That Petitioner Was Denied His Right To Have The Jury Consider His Mens Rea Defense.

Among the trial judge's instructions to the jury were the following:

> Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

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[15] Since Tennessee could have barred Respondent from raising any attack on the jury instructions as a result of his violation of the contemporaneous objection rule, surely the Tennessee Court of Criminal Appeals, had it chosen to do so, could have held that the only review on appeal would be under a cause and prejudice approach similar to that chosen by this Court in *United States* v. *Frady*, 456 U.S. 170 (1982). This state court did not so hold.

> For you to find the Defendant guilty of murder in the first degree, the State must have proven beyond a reasonable doubt:
>
> (1) That the defendant unlawfully killed the alleged victim.
>
> (2) That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse. If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption.
>
> (3) That the killings were willful: That is, that the Defendant must have intended to take the life of the alleged victim.
>
> (4) That the killing was deliberate: That is, with cool purpose.
>
> (5) That the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. (J.A. 184-85)

The trial judge defined second degree murder as follows:

> For you to find the Defendant guilty of this offense, the State must prove beyond a reasonable doubt that: (1) The defendant unlawfully and willfully killed the alleged victim; and (2) The killing was malicious. (J.A. at 186)

Following these instructions, the court defined "malice," which is an element of its instructions on both first and second degree murder:

> Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.
>
> Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.
>
> Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice. (J.A. at 186-87)

After malice was defined, the trial judge gave the presumption instructions which the lower federal courts held were in violation of *Sandstrom:*

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a pre-

> sumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A deadly weapon is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury. (J.A. at 187-88)

In order to understand the magnitude of the prejudice resulting from the presumption instructions, it is first necessary to return briefly to the elements of first degree murder and second degree murder. In his instructions on both degrees of murder, the trial judge explained to the jury that it was bound to acquit the defendant if it had a reasonable doubt as to whether there was malice. To find express malice, the jury had to find "an intent to do an injury to another" at and before the killing. (J.A. at 186) To find implied malice, the jury had to find "a wicked, depraved, and malignant spirit." (J.A. 187).[16]

The Petitioner and the amicus briefs filed in support of the Petitioner's argument argue that the State Court of Criminal Appeals correctly ruled that the Respondent's defenses did not place malice in issue. The United States argues along with the Petitioner that evidence of malice was overwhelming, but in making this argument neither the United States nor the Petitioner focus on the Tennessee definition of malice.

Amici urge on behalf of Respondent that it is vital, in order to assess fairly the prejudice resulting from the erroneous presumption instructions, to concentrate on the defenses raised by Respondent and how they relate to

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[16] Moreover, as to first degree murder, the judge told the jury that it could not convict unless it found willfulness, which he defined as "the intent to take the life of another," and deliberateness, which he defined as "with cool purpose." Obviously, these elements were closely related to the malice instruction, focusing on the mens rea of the defendant.

the definition of malice used in the Tennessee trial court. In his opening statement in that court, Respondent placed mens rea in issue. (J.A. at 8) It is apparent that Respondent had expert evidence that he suffered from longstanding depression and was mentally ill. (J.A. at 87) This expert testimony was bolstered by lay testimony, actually elicited in part by the prosecution, that the Respondent suffered physical and emotional problems during the year before the killings. He had lost 35 pounds, became withdrawn and seemed nervous for a year. (J.A. at 68-70) Additional expert testimony, brought out by the prosecution, established that Respondent had suffered head injuries that had led to chronic headaches. (J.A. at 91-92) Moreover, the trial judge recognized that there was evidence supporting the defendant's claim that he was substantially intoxicated at the time of the killings, and he instructed the jury on intoxication. (J.A. at 194)

The error in the Petitioner's argument and in the supporting argument of the United States is the assumption that the presumption instructions did not affect the defense when, in fact, they negated the defense. Respondent's mens rea defense[17] was that he lacked malice. To prove this he offered evidence of his mental illness, plus his intoxication, to prove[18] that he lacked actual or implied malice.

If alcohol plus mental illness had a tremendous effect upon Respondent, then a jury might have concluded that he did not intend to hurt anyone when he acted.[19] This

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[17] This is different from his insanity defense.

[18] Technically, he did not have to prove anything. He offered the proof in an effort to create a reasonable doubt as to his guilt.

[19] Thus, whether or not the mental illness was sufficient, standing alone, to establish an insanity defense, Respondent's argument was that his mental condition and his drinking rendered him unable to have the intent necessary for malice.

would cast doubt as to express malice.[20] And, as for implied malice, Respondent wanted the jury to consider whether he had "a wicked, depraved, and malignant spirit" or whether he was sick and his sickness was complicated by alcohol, which would cast doubt on implied malice.

The trial judge told the jury that it could consider evidence of drunkenness only on the question of premeditation. (J.A. at 194) Petitioner concedes that this is the case in his Petition for Certiorari at 11, and repeats this in his Brief. In the Petition, the argument is made that voluntary intoxication "does not, as a matter of law, negate the element of malice." (Page 11) Similarly, Petitioner argues in the Petition that the insanity defense technically is not considered by the jury until it has found the elements of the crime proved (Page 11), and repeats this argument in his Brief. The trial judge, in fact, told the jury that it was not to consider the defense of insanity until after evaluating the elements of the offense. (J.A. at 190)

The combined effect of the presumptions which the trial judge gave the jury and his instructions on the testimony regarding intoxication and insanity was as follows: The jury understood that it was to presume malice unless some evidence suggested its absence, and that all of the evidence that the defendant offered concerning mental illness and intoxication, which otherwise might have been viewed as substantially probative as to malice, could not be considered on that element with respect to either first or second degree murder.

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[20] Because of the close relationship of the doctrines of willfulness and deliberateness to express malice, these elements also might have been effected by the presumptions and the other instructions that affected the jury's consideration of the malice element.

Respondent does not argue that intoxication as a matter of law negates malice or that mental illness does. Rather, he argues that the circumstances bearing upon his intent and state of mind cannot be totally excluded and that the combination of presumption instructions and the other instructions had the effect of excluding them and leaving the presumptions standing as directives governing the jury's decisionmaking.

Suppose, for instance, the Respondent lacked the requisite intent not solely because of a mental disease or defect, but because of the way in which heavy alcohol consumption affected long-term depression. This is not a diminished responsibility defense. It is defense evidence that negates express malice and that might cause a jury to find no implied malice, or at least to have a reasonable doubt regarding implied malice. Respondent need not address the question whether a State might constitutionally punish as murder conduct that is unintentional, for Tennessee has chosen to define both first and second degree murder in a manner that focuses on intent. Surely, Tennessee may not establish this element of criminal activity and then bar the defendant from offering evidence to show that he lacked the very intent which comprises the mens rea element of the crime charged. Yet, that is exactly what the trial judge's instructions did.[21]

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[21] The prosecutor opened to the jury by stating that he would prove that the defendant's acts were intended to kill. He made a specific reference to "a heart unconcerned about the welfare of others." (J.A. at 6) In his first closing argument, the prosecutor specifically stated that the trial judge would instruct the jury "that all killings or all murders are presumed to be malicious unless rebutted." (J.A. at 170) In his final closing argument, the prosecutor chose again to define the word "malicious" as "an evil spirit, and heart bent on mischief regardless of social duty." (J.A. at 181) The prosecutor also elicited testimony from a defense expert by means of a leading question, which told the jury that a single incident of heavy drinking would not

As for the amnesia evidence offered by the Respondent, Petitioner correctly states that amnesia is not a defense. This is exactly what the trial judge told the jury: amnesia "is in itself no defense to this charge." (J.A. at 195) Respondent's use of amnesia was to bolster the mens rea defense. (J.A. at 87-88) His inability to remember anything about the events was offered to corroborate the theory that he lacked express and implied malice because of the condition that he was in. Yet, the trial judge's instruction effectively removed from the jury's consideration the possibility that all of this evidence might have caused the jury to find a reasonable doubt on the malice element of both degrees of murder.

For these reasons, Respondent fairly claims that the presumptions used in these instructions absolutely deprived him of his defense. This cannot be harmless error.

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amount to a mental illness. (J.A. at 98) This may have led the jury to conclude, in light of the trial judge's instructions, that it could not consider drinking or mental problems in deciding whether the defendant had the requisite intent. Surely the defendant was entitled to prove an absence of an intent to kill and that whatever he did was not the result of a "heart bent on mischief regardless of social duty." In *State* v. *Martin*, note 10, *supra*, the Tennessee Supreme Court recognized the confusion inherent in such instructions, especially where, as in the instant case, the trial judge fails to instruct on malice when he gives the elements of first degree murder.

CONCLUSION

Amici ask that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit on the basis of the arguments offered herein.

Respectfully submitted,

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